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6 IN THE UNITED STATES DISTRICT COURT

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10 FOR THE NORTHERN DISTRICT OF CALIFORNIA

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MANUEL LOPEZ,

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Plaintiff,

No. C 10-01645 WHA

v.

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WACHOVIA MORTGAGE, A DIVISION
OF WELLS FARGO BANK, F/K/A WORLD
SAVINGS BANK (“WELLS FARGO”),
AND DOES 1 THROUGH 50, INCLUSIVE,

**ORDER GRANTING
DEFENDANT’S MOTION
TO DISMISS AND DENYING
AS MOOT DEFENDANT’S
MOTION TO STRIKE**

Defendant.

/

INTRODUCTION

In this action regarding a refinanced mortgage loan, defendant World Savings Bank moves to dismiss all five state claims asserted against it by plaintiff Manuel Lopez. Defendant also moves to strike portions of the complaint. Because the instant action involves a loan transaction between plaintiff and former federal savings association World Savings Bank, this order refers to defendant as World Savings Bank for the sake of clarity. For the reasons set forth below, defendant’s motion to dismiss is **GRANTED**. Its motion to strike is **DENIED AS MOOT**.

25

STATEMENT

This dispute involves a refinanced mortgage loan made by World Savings Bank, FSB (“WSB”) to plaintiff Manuel Lopez through Remax Real Estate Company (Compl. ¶¶ 3, 13). WSB was later renamed Wachovia and is now a division of Wells Fargo Bank, N.A.

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1 Plaintiff's complaint named Wachovia Mortgage Corporation as defendant, but because
2 Wachovia is now a division of Wells Fargo, Wells Fargo certified itself as the proper defendant
3 (Dkt. 2). At the time plaintiff executed his loan with WSB, however, WSB was a federal savings
4 bank governed by the Office of Thrift Supervision (Rapchine Decl. Exh. A).

5 On March 27, 2007, plaintiff refinanced his mortgage loan with WSB in order to expand
6 his property. Because he did not speak English, he negotiated the terms with a Remax agent
7 solely in Spanish. He paid \$300 to have his credit checked but did not receive a copy of the
8 report. Defendant did not request his taxes or any type of proof of income. Two weeks later,
9 plaintiff was approved for the loan and met with a notary to sign the loan documents. The notary
10 indicated that she was in a hurry because she had left her children with a babysitter, so plaintiff
11 signed the documents without any explanation. He was under the impression that he was
12 obtaining a thirty-year fixed rate loan, but later learned that he had received a two-year fixed rate
13 loan. His payments began to increase an extra \$200 per month. He was provided with a copy of
14 the loan terms written in English but not in Spanish. Defendant misrepresented and failed to
15 disclose material facts that, if known to plaintiff, would have led him to forego entering into the
16 refinance agreement. Defendant conspired to defraud plaintiff and acted toward him in a willful,
17 vexatious and malicious manner (Compl. ¶¶ 3–11).

18 Plaintiff initiated the instant action in Alameda County Superior Court, but it was brought
19 to federal court via federal-question removal jurisdiction. The complaint alleges claims for:
20 (1) unconscionable contract, (2) violation of Business & Professions Code § 17200, (3) violation
21 of California Civil Code § 1572, (4) breach of implied covenant of good faith and fair dealing,
22 and (5) declaratory relief (Compl. ¶¶ 20–63).

23 **ANALYSIS**

24 **1. STANDARD OF REVIEW.**

25 To survive a motion to dismiss for failure to state a claim, a pleading must contain
26 sufficient factual matter, accepted as true, to state a claim that is plausible on its face.
27 FRCP 12(b)(6); *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). A claim is facially plausible
28 when there are sufficient factual allegations to draw a reasonable inference that defendants are

1 liable for the misconduct alleged. While a court “must take all of the factual allegations in the
2 complaint as true,” it is “not bound to accept as true a legal conclusion couched as a factual
3 allegation.” *Id.* at 1949-50. “[C]onclusory allegations of law and unwarranted inferences are
4 insufficient to defeat a motion to dismiss for failure to state a claim.” *Epstein v. Wash. Energy*
5 *Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996).

6 Dismissal without leave to amend is only appropriate when the court is satisfied that the
7 deficiencies in the complaint could not possibly be cured by amendment. *Jackson v. Carey*,
8 353 F.3d 750, 758 (9th Cir. 2003) (citation omitted).

9 **2. PREEMPTION.**

10 Defendant argues that all five of plaintiff’s claims are preempted by federal law because
11 WSB was a federally chartered savings association regulated by the Office of Thrift Supervision
12 (“OTS”) pursuant to the Home Owners Loan Act (“HOLA”) at the time of the loan (Br. at 2).
13 *See* 12 U.S.C. 1461, *et seq.* This order declines to find that plaintiff’s five state claims, as
14 alleged, are preempted, at least at this stage on this record.

15 **A. World Savings Bank’s Status
16 As a Federal Savings Association.**

17 It is undisputed that plaintiff refinanced his loan from WSB on or about March 21, 2007.
18 Defendant contends that WSB was a federal savings bank at that time, that WSB was renamed
19 Wachovia Mortgage, FSB in December 2007, and that Wachovia became a division of Wells
20 Fargo in 2009 (Br. at 2). In support of this contention, defendant has submitted, *inter alia*, public
21 records evidencing WSB’s initial charter, its subsequent name change, its governance by OTS,
22 and the certification of its conversion to a national bank with the name Wells Fargo Bank
23 Southwest (Rapkine Decl. Exh. A-D). Defendant has also provided a copy of the deed of trust
24 signed by plaintiff as Exhibit E. Defendant has requested that the Court take judicial notice of
25 these documents.

26 In ruling on a motion to dismiss for failure to state a claim, “a court may generally
27 consider only allegations contained in the pleadings, exhibits attached to the complaint, and
28 matters properly subject to judicial notice.” *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir.
2007). FRE 201 provides, “[a] judicially noticed fact must be one not subject to reasonable

1 dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court
 2 or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot
 3 reasonably be questioned.” This order finds that these public records and government documents
 4 are not subject to reasonable dispute and takes judicial notice of Exhibits A through E. These
 5 judicially noticed facts show that at the time plaintiff signed his loan with WSB, that institution
 6 was regulated by OTS. WSB later changed its name to Wachovia Mortgage, FSB, remaining
 7 under the regulatory power of OTS, and therefore subject to HOLA. Wachovia became a division
 8 of Wells Fargo in 2009. Thus, although Wells Fargo is a federally chartered national bank under
 9 the National Bank Act, the instant action is governed by HOLA because the loan originated with
 10 WSB.

11 **B. Preemption Analysis under HOLA.**

12 Congress enacted HOLA in 1933 as a “radical and comprehensive response to the
 13 inadequacies of the existing state [home mortgage] systems.” *Conference of Federal Sav. & Loan*
 14 *Assns. v. Stein*, 604 F.2d 1256, 1257 (9th Cir. 1979). In enacting HOLA, Congress established
 15 the organization now known as the Office of Thrift Supervision and gave its director plenary
 16 authority to issue regulations governing federal savings and loans. 12 U.S.C. 1462a.

17 In 1996, OTS issued 12 C.F.R. 560.2. This regulation expressly provides for federal
 18 preemption of state law “purporting to regulate” federal savings associations:

19 . . . OTS hereby occupies the entire field of lending regulation for
 20 federal savings associations. OTS intends to give federal savings
 21 associations maximum flexibility to exercise their lending powers
 22 in accordance with a uniform federal scheme of regulation.
 23 Accordingly, federal savings associations may extend credit as
 24 authorized under federal law, including this part, without regard to
 25 state laws purporting to regulate or otherwise affect their credit
 26 activities.

27 12 C.F.R. 560.2. Section 560.2 also provides a list of the types of state laws that are preempted.¹

28 ¹ Section 560.2(b) provides:

29 Illustrative examples. Except as provided in § 560.110 of this part, the types of
 30 state laws preempted by paragraph (a) of this section include, without limitation,
 31 state laws purporting to impose requirements regarding:

32 (1) Licensing, registration, filings, or reports by creditors;

1 OTS, however, has set forth exceptions to this broad preemption scheme. Section
2 560.2(c) provides that state contract, commercial, real property, and tort law, among others, are
3 not preempted, “to the extent that they only incidentally affect the lending operations of Federal
4 savings associations or are otherwise consistent with the purposes of [the regulation].”²

5

6 (2) The ability of a creditor to require or obtain private mortgage insurance,
7 insurance for other collateral, or other credit enhancements;

8 (3) Loan-to-value ratios;

9 (4) The terms of credit, including amortization of loans and the deferral and
10 capitalization of interest and adjustments to the interest rate, balance, payments
due, or term to maturity of the loan, including the circumstances under which a
11 loan may be called due and payable upon the passage of time or a specified event
external to the loan;

12 (5) Loan-related fees, including without limitation, initial charges, late charges,
prepayment penalties, servicing fees, and overlimit fees;

13 (6) Escrow accounts, impound accounts, and similar accounts;

14 (7) Security property, including leaseholds;

15 (8) Access to and use of credit reports;

16 (9) Disclosure and advertising, including laws requiring specific statements,
information, or other content to be included in credit application forms, credit
solicitations, billing statements, credit contracts, or other credit-related documents
and laws requiring creditors to supply copies of credit reports to borrowers or
applicants;

17 (10) Processing, origination, servicing, sale or purchase of, or investment or
participation in, mortgages;

18 (11) Disbursements and repayments;

19 (12) Usury and interest rate ceilings to the extent provided in 12 U.S.C. 1735f-7a
and part 590 of this chapter and 12 U.S.C. 1463(g) and § 560.110 of this part; and

20 (13) Due-on-sale clauses to the extent provided in 12 U.S.C. 1701j-3 and part 591
of this chapter.

25 ² Section 560.2(c) provides:

26 State laws that are not preempted. State laws of the following types are not
27 preempted to the extent that they only incidentally affect the lending operations
of Federal savings associations or are otherwise consistent with the purposes of
paragraph (a) of this section:

28 (1) Contract and commercial law;

1 Contract and tort claims based on unfair competition statutes have been found exempt from
2 HOLA preemption because they involve general laws governing all businesses, having only an
3 incidental effect on a loan association's lending activities. *See Branick v. Downey Sav. and Loan*
4 Ass'n

5 OTS has provided the following framework for preemption analysis:

6 When analyzing the status of state laws under § 560.2, the first
7 step will be to determine whether the type of law in question is
8 listed in paragraph (b). If so, the analysis will end there; the law is
9 preempted. If the law is not covered by paragraph (b), the next
10 question is whether the law affects lending. If it does, then, in
11 accordance with paragraph (a), the presumption arises that the law
12 is preempted. This presumption can be reversed only if the law
can clearly be shown to fit within the confines of paragraph
(c) [providing that state laws of general applicability only
incidentally affecting federal savings associations are not
preempted]. For these purposes, paragraph (c) is intended to be
interpreted narrowly. Any doubt should be resolved in favor of
preemption.

13 *Silvas v. E*Trade Mortg. Corp.*, 514 F.3d 1001, 1005 (9th Cir. 2008). Furthermore, a claim or
14 state statute may be preempted by HOLA on an “as applied” or case-specific basis. *Id.* at 1006.

15 Defendant contends that plaintiff's state claims are all based upon plaintiff's allegations
16 that: (1) WSB misrepresented the terms of the loan (two-year fixed rate versus thirty-year fixed
17 rate), (2) WSB did not adequately determine if plaintiff could pay the loan back, (3) plaintiff
18 signed the documents without any explanation, and (4) plaintiff did not receive the documents in
19 Spanish (Br. at 2). Agreeing with defendant's characterization of the complaint, the Court finds
20 insufficient grounds for preemption at this stage.

21 (2) Real property law;

22 (3) Homestead laws specified in 12 U.S.C. 1462a(f);

23 (4) Tort law;

24 (5) Criminal law; and

25 (6) Any other law that OTS, upon review, finds:

26 (i) Furthers a vital state interest; and

27 (ii) Either has only an incidental effect on lending or is otherwise contrary to the purposes expressed in this section.

28

1 Applying OTS' framework, that defendant misrepresented the terms of the loan is not
2 preempted. Plaintiff alleges that defendant led him to believe that he was receiving a thirty-year
3 fixed rate and then had him sign a loan agreement, in a language he did not understand,
4 specifying a two-year fixed rate. As applied here, laws prohibiting blatant misrepresentation of a
5 loan's terms are not expressly preempted in Section 560.2(b). While it is true that such laws
6 would affect lending, the presumption of preemption is reversed because they fit within the
7 confines of Section 560.2(c), which provides an exception for claims involving contract or tort
8 law. Plaintiff's allegations as stated in the complaint are admittedly vague. But accepting them
9 as true, as required here, this order finds that defendant may be liable for claims based upon
10 breach of contract and tort laws that are of general applicability to all businesses and that only
11 incidentally affect lending operations. This is the same reasoning the court in *Branick v. Downey*
12 *Savings and Loan Association* applied in finding that the plaintiff's claims for violation of state
13 unfair competition laws were not preempted by HOLA. See *Branick*, 24 Cal. Rptr. 3d at 412–13.

14 Every decision cited by defendant has found that the plaintiffs' allegations were expressly
15 preempted by 12 C.F.R. 560.2(b) and have ended their inquiries there. For example, the plaintiffs
16 in *Silvas* brought claims for unfair advertising and unfair competition against a federal savings
17 association under California Business and Professions Code §§ 17500 and 17200. See *Silvas*,
18 514 F.3d at 1003. The Ninth Circuit upheld the dismissal of the claims because they were based
19 on the types of laws listed Section 560.2(b), specifically subsections (b)(9) and (b)(5), which
20 involved state laws purporting to impose requirements regarding disclosure and advertising as
21 well as loan-related fees. *Id.* at 1006–07. A finding of express preemption also proved
22 determinative in *Weiss v. Washington Mutual Bank*, where the plaintiff's claims were premised
23 upon a lack of disclosure regarding prepayment penalties, a lending practice expressly preempted
24 by 12 C.F.R. 560.2(b). 147 Cal. App. 4th 72 (2007).

25 Defendant argues that because each of plaintiff's state claims is premised upon
26 allegations regarding "terms of credit," "disclosure," and "processing [and] origination" of
27 mortgages, they are expressly preempted by 12 C.F.R. 560.2(b). As explained above, however,
28 laws prohibiting misrepresentation of a loan's material terms are not expressly preempted by

1 Section 560.2(b). This is where the instant action sharply diverges from the cited case law.
2 Unlike those decisions, this order does not find the claims at issue expressly preempted by
3 Section 560.2(b). Nor does it find them preempted by the other provisions of Section 560.2.

4 Although this order rejects preemption at this stage, it is premature to make a final
5 decision on this issue until plaintiff has properly pled claims under state law. Even then, it might
6 be premature to rule on a preemption defense until a trial can be held to allow a record on the
7 incidental effects of the state rules in question on the business of lending by a federal savings
8 association.

9 Turning to the adequacy of pleading of the state law claims, each state claim will be
10 **DISMISSED** but with leave to seek to amend.

11 **3. FIRST CLAIM: UNCONSCIONABLE CONTRACT.**

12 Defendant is accused of violating California Civil Code § 1670.5 by causing plaintiff to
13 make an uninformed decision to enter into an unconscionable loan agreement (Compl. ¶¶ 20–29).
14 Plaintiff's complaint alleges that all of the loan documentation was written in English, even
15 though plaintiff only knew Spanish and negotiated the loan in Spanish. Section 1670.5 provides:
16 “if the court as a matter of law finds [a] contract or any clause of [a] contract to have been
17 unconscionable at the time it was made the court may refuse to enforce the contract”

18 Section 1670.5, however, does not create an affirmative claim but merely codifies the
19 *defense* of unconscionability. *Dean Witter Reynolds, Inc. v. Superior Court*, 211 Cal. App. 3d
20 758, 766 (1989). Plaintiff therefore states no claim for relief under this statute. That said, a
21 potential defendant is always entitled to seek declaratory relief to establish unconscionability as a
22 defense so long as the case and controversy requirement of Article III is pled and established.
23 Jurisdiction to award declaratory relief exists only in case of actual controversy. *American States*
24 *Ins. Co. v. Kearns*, 15 F.3d 142 (9th Cir. 1994). Plaintiff has not pled that an actual, present
25 controversy exists regarding the enforcement of the contract. He has not pled, for example, that
26 someone is trying to foreclose or is threatening to do so. Until plaintiff meets the Article III
27 requirement an award of declaratory relief is unwarranted.

28

1 Plaintiff's complaint also alleges that defendant violated California Civil Code § 1632,
2 which states: "Any person engaged in a trade or business who negotiates primarily in
3 Spanish . . . orally or in writing, in the course of entering into any of the following, shall deliver
4 to the other party to the contract or agreement and prior to the execution thereof, a translation of
5 the contract or agreement in the language in which the contract or agreement was negotiated . .
6 . ." This rule applies to a "loan or extension of credit for use primarily for personal, family or
7 household purposes where the loan or extension of credit is subject to the provisions of Article 7
8 (commencing with Section 10240)." Cal. Civ. Code § 1632(b)(4). Section 10240 in turn applies
9 to certain real estate loans secured by real property that are negotiated exclusively by a real estate
10 broker. Cal. Bus. & Prof. Code § 10240.

11 Plaintiff fails to plead a claim against defendant for a violation of Section 1632, as he
12 does not allege that defendant WSB was a real estate broker and thus subject to the requirement
13 to provide a translation. Plaintiff alleges that Hugo De Oyos, working for Remax Real Estate
14 Company was the broker (Compl. ¶ 3). Accordingly, plaintiff's claim for violation of Section
15 1632 is dismissed. The undersigned also notes that this claim may be barred by the applicable
16 statute of limitations and that plaintiff has not alleged that he has or can tender funds sufficient
17 to effectuate a rescission of the loan, as required by Section 1632(k). *See* Cal. Code Civ. Pro.
18 § 340(a); Cal. Civ. Code §§ 1632(k), 1691(b).

19 Plaintiff has not yet met the Article III pleading requirement for declaratory relief.
20 This requirement must be met if plaintiff is to receive declaratory relief for any of his state claims.
21 Nor has he alleged facts sufficient for a claim under Section 1632. Accordingly, his claim for
22 unconscionable contract is **DISMISSED**.

23 **4. SECOND CLAIM: VIOLATION OF CALIFORNIA
24 BUSINESS & PROFESSIONS CODE § 17200.**

25 Plaintiff's second claim alleges that defendants violated California Business & Professions
26 Code § 17200 (Compl. ¶¶ 30–39). To state a claim for unfair competition pursuant to
27 Section 17200, a plaintiff must allege that a defendant engaged in an "unlawful, unfair, or
28 fraudulent business act or practice" or in "unfair, deceptive, untrue or misleading advertising."

1 Cal. Bus. & Prof. Code § 17200. The complaint fails to state a claim under all three prongs of
2 the statute.

3 The “unlawful” prong of the statute incorporates other laws and treats violations of those
4 laws as unlawful business practices independently actionable under state law. *Chabner v.*
5 *United Omaha Life Ins. Co.*, 225 F.3d 1042, 1048 (9th Cir. 2000). A defendant cannot be liable
6 under Section 17200 for committing “unlawful” business practices without having violated
7 another law. As discussed below, the complaint fails to plead sufficiently the violation of any
8 law.

9 Plaintiff contends that defendant engaged in an “unlawful” business practice in violation
10 of Section 17200 by extending the loan to him without acquiring any proof of plaintiff’s income
11 or conducting an adequate due diligence inquiry to determine if he could pay the loan back
12 (Compl. ¶ 4). A financial institution, however, owes no duty of care to a borrower when the
13 institution’s involvement in the loan transaction does not exceed the scope of its role as a mere
14 money lender. *Nymark v. Heart Fed. Savings & Loan Assn.*, 231 Cal. App. 3d 1089, 1096 (1991).
15 Without factual allegations that show defendant stands in the place of plaintiff’s agent, there is no
16 violation alleged and dismissal is appropriate.

17 To the extent that plaintiff’s Section 17200 “unlawful” business practices claim is based
18 on California Civil Code § 1670.5, as discussed above, he does not adequately allege a violation
19 of law. He similarly fails to state a claim for relief for violation of California Civil Code § 1632.
20

21 Given that the complaint fails to sufficiently allege the violation of any law, plaintiff’s
22 claim under the “unlawful” prong of Section 17200 fails.

23 Moreover, the complaint similarly fails to state a claim under the “unfair” prong of
24 Section 17200. “The term ‘unfair . . . business act or practice’ . . . mean[s] deceptive conduct that
25 injures consumers and competitors.” *Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.*,
26 20 Cal. 4th 163, 195–96 (1999). The complaint fails to allege facts sufficiently demonstrating
27 that defendant engaged in deceptive conduct that caused plaintiff injury. The allegations in the
28 complaint are conclusory in nature and insufficient as they stand.

1 To the extent that plaintiff's Section 17200 claim is predicated on the "fraudulent" prong
2 of the statute, it fails to state a claim for relief as well. Allegations of fraudulent conduct under
3 Section 17200 must satisfy the heightened pleading requirements of Rule 9(b). *See Vess v.*
4 *Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-05 (9th Cir. 2003). Rule 9(b) demands that
5 averments of fraud must be accompanied by 'the who, what, when, where, and how' of the
6 misconduct charged." *Id.* at 1106. The plaintiff must set forth what is false or misleading about
7 a statement, and why it is false. *Id.*

8 Plaintiff did not plead with the requisite particularity the specific misrepresentations that
9 are attributable to defendant and which individuals made them. Plaintiff's Section 17200 claim
10 fails to satisfy the heightened pleading requirements of Rule 9(b) to state a cognizable claim
11 based on the "fraudulent" prong of the statute.

12 Accordingly, plaintiff's California Business & Professions Code § 17200 claim is
13 **DISMISSED.**

14 **5. THIRD CLAIM: VIOLATION OF CALIFORNIA CIVIL CODE § 1572.**

15 Plaintiff's third claim alleges fraud under California Civil Code § 1572. The particularity
16 requirements of Rule 9(b) apply. Section 1572 provides:

17 Actual fraud . . . consists in any of the following acts, committed by
18 a party to the contract, or with his connivance, with intent to
deceive another party thereto, or to induce him to enter into the
contract:

19 1. The suggestion, as a fact, of that which is not true, by
20 one who does not believe it to be true;

21 2. The positive assertion, in a manner not warranted by the
information of the person making it, of that which is not
true, though he believes it to be true;

22 3. The suppression of that which is true, by one having
knowledge or belief of the fact;

23 4. A promise made without any intention of performing it;
24 or,

25 5. Any other act fitted to deceive.

26 The complaint alleges that defendants' misrepresentations, failures to disclose, and failure
27 to investigate as described above were made with the intent to induce the unsophisticated plaintiff

1 to accept an unfavorable loan (Compl. ¶ 41). The complaint does not state, however, “the who,
2 what, when, where, and how” of the misconduct charged. *See Vess*, 317 F.3d at 1103–05.
3 Plaintiff does not plead the specific representations that are attributable to defendants, the identity
4 of the employees who made the representations, their authority to speak, what they said or wrote,
5 and when it was said or written. Furthermore, the complaint alleges that defendants acted in a
6 manner that was “willful . . . and maliciously calculated,” but such conclusory, vague language
7 is insufficient (*see* Compl. ¶ 9). Rule 9(b) does not allow a complaint to merely lump multiple
8 defendants together and make conclusory accusations regarding their actions and intentions.

9 Plaintiff requests that the pleading standard for fraud be relaxed in this instance.
10 Citing *Tarmann v. State Farm Mut. Auto Ins. Co.*, 2 Cal. App. 4th 153 (1991), he argues that
11 because defendant is in a greater position to know the names of the individuals who perpetrated
12 the fraud, plaintiff should not be forced to name them (Opp. 6–7). This exception did not apply
13 in *Tarmann*, and it does not apply here. Following *Tarmann*’s reasoning, defendant has no
14 more reason to know who made the allegedly false representations to plaintiff than plaintiff.
15 *See Tarmann*, 2 Cal. App. 4th at 158.

16 Plaintiff’s claim for fraud under California Civil Code § 1572 is thus **DISMISSED**.

17 **6. FOURTH CLAIM: BREACH OF IMPLIED COVENANT OF
18 GOOD FAITH AND FAIR DEALING.**

19 Plaintiff’s contends that defendant has breached the implied covenant of good faith and
20 fair dealing but does not specify whether his claim is based upon contract law or tort law.
21 Under California law, a claim for breach of implied covenant under contract law is necessarily
22 based on the existence of an underlying contractual relationship. The essence of the covenant is
23 that neither party to the contract will do anything which would deprive the other of the benefits of
24 the contract. The duty of good faith and fair dealing, however, is “a supplement to an existing
25 contract, and thus it does not require parties to negotiate in good faith prior to any agreement.”
26 *McClain v. Octagon Plaza, LLC*, 159 Cal. App. 4th 784, 799 (2008). Thus, to the extent that the
27 complaint’s allegations stem from the formation and negotiation of the loan, plaintiff’s claim for
28 breach of the covenant must be dismissed.

1 Moreover, no implied covenant tort is available to plaintiff. “Generally, no cause of
2 action for the tortious breach of the implied covenant of good faith and fair dealing can arise
3 unless the parties are in a ‘special relationship’ with ‘fiduciary characteristics.’” *Pension Trust*
4 *Fund v. Federal Ins. Co.*, 307 F.3d 944, 955 (9th Cir. 2002). California courts do not invoke a
5 special relationship between a lender and borrower absent special circumstances with “fiduciary
6 characteristics.” *Oaks Mgmt. Corp. v. Superior Court*, 145 Cal. App. 4th 453, 466 (2006).
7 The complaint does not allege facts establishing a “special relationship” between plaintiff and
8 defendant that could justify extending tort liability.

9 As such, plaintiff's claim for breach of the covenant of good faith and fair dealing must be
10 **DISMISSED.**

10 | DISMISSED.

7. FIFTH CLAIM: DECLARATORY RELIEF.

12 Plaintiff's complaint requests a "declaration of rights and duties of the parties herein . . . to
13 determine the actual status and validity of the loan, deed of trust, nominated beneficiaries, actual
14 beneficiaries . . ." (Compl. ¶ 63). "Declaratory relief is only appropriate (1) when the judgment
15 will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it
16 will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the
17 proceeding." *Guerra v. Sutton*, 783 F.2d 1371, 1376 (9th Cir. 1986). As described in section
18 three above, a plaintiff must plead that a present and actual controversy exists in order to receive
19 declaratory relief. Furthermore, declaratory relief is not warranted in a case in which a complaint
20 makes no case on the merits. *People v. Ray*, 181 Cal. App. 2d 64, 69 (1960). Plaintiff's
21 complaint fails to meet the above criteria and does not allege a viable substantive claim.
22 The complaint does not adequately plead why declaratory relief is appropriate, and plaintiff
23 makes no reference to this claim in his opposition to defendant's motion.

24 Accordingly, plaintiff's claim for declaratory relief is **DISMISSED**.

CONCLUSION

26 For the foregoing reasons, defendant's motion to dismiss all claims asserted in the
27 complaint is **GRANTED**. In light of this ruling, defendant's motion to strike is **DENIED AS MOOT**.

1 Within **FOURTEEN CALENDAR DAYS**, plaintiff may file a motion on the normal 35-day
2 track seeking to cure the foregoing deficiencies. A proposed amended complaint must be
3 appended to such a motion, and the motion should clearly explain why each amended claim
4 overcomes the deficiencies stated herein.

5 The Court notes that plaintiff's counsel failed to appear at the July 15 hearing on the
6 instant motion. Defendant's counsel proceeded with argument, stating that plaintiff's claims are
7 barred by the statute of frauds and parol evidence rule. This order does not decide these issues,
8 but plaintiff's motion should be mindful of them.

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10 **IT IS SO ORDERED.**

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12 Dated: July 19, 2010.

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WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE